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Eminent Domain - Evidence of Post-Condemnation Sale

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the will, and determined that the "old" shares should pass in "new" form. He, however, unwarrantedly ignored § 14 of the Wills Act and and was sidetracked by the ademption argument.

The holding of the instant case demands that the practicing attorney exercise extreme caution in the drafting of a will to pass shares of stock. The intent to pass the shares owned at the writing and thus any split shares, if that is the goal, must be explicitly stated in order to preclude a frustration of the testator's purpose.

Mark A. Rock

EMINENT DOMAIN—EVIDENCE OF POST-CONDEMNATION SALE—Noting the division in authorities, the Supreme Court of Rhode Island holds that evidence of the sale price of comparable property may be admissible, even though the sale occurred subsequent to the taking.

Manning v. The Redevelopment Authority of Newport, R.I., —R.I.—, 238 A.2d 378 (1968).

Condemnation proceedings were instituted in the Superior Court of Rhode Island by plaintiff, an owner of an improved parcel of real estate (Y property), for the assessment of damages for the taking by defendant, a redevelopment agency. The land was being taken in connection with an urban renewal project. Real estate experts who appeared for each of the parties based their respective opinions of the condemned parcel's market value upon the sale prices of supposedly similar and comparable properties. One expert for the plaintiff fixed the value at $39,000 and another at 38,300; the defendant's sole expert valued the parcel at $22,000. The defendant's expert stated that he relied in substantial part in his appraisal upon the sale price of X property, an (allegedly) similar parcel of property which he located on the same street and in the same neighborhood as the property in litigation but which had a fixed sale date of about four months after the condemnation of Y property. He was then questioned generally about those factors which in his opinion made that property comparable, and in addition, was asked to give its sale price. The plaintiff objected and the trial judge sustained, excluding the testimony on the ground that the sale of X real estate occurred *subsequent* to rather than *before* the taking, and for the additional reason that it would be too time consuming to permit inquiry into whether the urban renewal project, which prompted the taking had introduced a new valuation influence and had thereby materially affected the sale of X property. The trial judge, sitting without a jury, assessed damages at $36,500.

The defendant appealed the judgement to the Supreme Court of Rhode Island and attributed what it claimed to be an excessive award to alleg-

edly erroneous rulings by the trial judge excluding evidence as to the sale of what defendant argued was a comparable parcel of real estate. *Held*, it was error to automatically bar evidence of sale of otherwise comparable property merely because it occurred subsequent to the condemnation.[1]

When property of a private owner is "taken" for public use without his consent, the United States Constitution states that just compensation must be paid to such owner.[2] The courts have uniformly construed the term "just compensation" as requiring compensation equivalent to the fair market value of the property "taken", determined at the time of the taking, i.e. the price at which the owner might have acutally sold the property at or about the time of the taking.[3]

In eminent domain or condemnation proceedings, the courts of all jurisdictions regard evidence of recent selling prices of properties similar to, and in the same neighborhood as the property taken, as being of material assistance to the trier of fact in determining the fair market value of property taken by condemnation.[4] One authority stated that, "it is an unusual case in which no evidence of sales of neighboring land can be offered which will not be in some degree helpful."[5] Therefore, sale prices of comparable property are relevant to the value of the property in question, and may be introduced into evidence for either of three purposes:

(a) on direct examination of expert or lay witnesses as independent substantive evidence of the value of property to which the comparison relates;[6]

(b) on direct examination of the value-witness to give an account of the factual basis upon which he founds his opinion on the issue of value of real estate in controversy, i.e. admissible not as direct evidence of

1. The judgement of the lower court as to the amount of damages was affirmed. The basis of the court's ruling was that in absence of an offer of proof that the rejected testimony would have been that the sale price of the alleged comparable property sold subsequent to the condemnation had not been materially affected by the taking of Y property, a ruling excluding testimony as to the comparability of the property sold could not be found prejudical though erroneous. *See* note 25 *infra*.

2. U.S. CONST. amend. V; The Fifth Amendment restraint on power of eminent domain is deemed incorporated by the Fourteenth Amendment due process clause, and hence is a limitation on state action as well. Chicago, B. & Q.R.R. Co. v. Chicago, 166 U.S. 226 (1897).

3. 1 L. ORGEL, VALUATION UNDER EMINENT DOMAIN 15 (2d ed. 1953); United States v. Miller, 317 U.S. 369, 374 (1943). The measure of compensation is not the value to the owner or the special value to the taker.

4. *Id.* at § 137; 5 NICHOLS, EMINENT DOMAIN 21.3 (3d ed. 1962).

5. 5 NICHOLS, *supra* note 4, at 431.

6. The price paid for similar land, when admitted as independent evidence of value, must be proved with as much formality as any other material fact, and witnesses are not permitted to testify in regard to sales unless they were parties thereto, or who were brokers who effected the sale, or in some other manner knew the price paid of their own knowledge, and not as a matter of common knowledge or hearsay. *Id.* at 431-32.

value of the property under consideration, but in support of the opinion testified to by the expert as to the value of the property taken;[7]

(c) on cross-examination of the value-witness to test his knowledge, experience and investigation and thus affect the weight given to his opinion.[8]

Certain preliminary requirements must be observed before evidence of comparable sales may be introduced into evidence for whichever of the above stated purposes. The three most important limitations concern: (a) degree of similarity between the property that was the subject of the sale and the property which is being valued; (b) proximity between date of sale and date of valuation (taking); (c) the nature of the sale, as determined by the circumstances under which it was made. As is often stated by the courts, the best criterion of what constitutes just compensation for property taken by exercise of eminent domain power is its fair market value as evidenced by "prices paid at or about the time of the taking at voluntary sales in the open market by willing buyers to willing sellers for parcels substantially similar and comparable to that taken."[9]

Since there are many factors to be considered such as proximity in location, size, general adaptability and improvements, there can be no fixed definition of "similarly situated" or general rule which can be given regarding the degree of similarity which must exist to make such evidence admissible since no two properties are alike. It must necessarily vary with

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7. For a discussion of opinion evidence and persons who may qualify as valuation witnesses. see 1 L. ORGEL, *supra* note 3, at §§ 130-135, 5 NICHOLS, *supra* note 4, at § 18.

8. In most jurisdictions, the courts have followed the rule that evidence of any sale or contract to sell other similar property in the neighborhood is admissible on direct examination to prove the market value of the property in question. The majority rule is sometimes called the "Massachusetts" rule. In some jurisdictions, the courts have taken the contrary view and have excluded such evidence on direct examination. The exclusion is based on the notion that any attempt intelligently to infer the value of the instant property from the sale price of a different piece of property would raise too many collateral issues rather than in the belief that evidence of sales is irrelevant in determining market value. In these jurisdictions, evidence of sales is permitted on cross-examination of an expert witness testifying as to value, for the purpose of testing his credibility if the direct testimony of the witness shows that his opinion was predicated on knowledge of comparable sale. This rule is also known as the "Pennsylvania" rule. However, many jurisdictions that had once adhered to the "Pennsylvania" rule have adopted either by judicial or statutory change in such rule against the admissibility of evidence of comparable sales on direct examination. The rule has radically been changed in Pennsylvania under the new Eminent Domain Code, PA. STAT. ANN. tit. 26 §§ 1-101 to -903 (1964), specifically see § 705(2)(i). This subclause allows evidence on both direct and cross-examination of valuation witnesses regardless of whether they relied on or based their opinion on the sale. Such evidnce is also admissible as evidence of market value as well as for credibility purposes. For a fuller discussion of this problem and for the rule followed in a particular jurisdiction see 5 NICHOLS, supra note 4, at § 21.3.

9. 238 A.2d at 380. *See* United States v. Miller, 317 U.S. 369 (1943); Westchester County Park Commission v. United States, 143 F.2d 688 (2d Cir. 1944).

the circumstances of each case.[10] Whether there is sufficient similarity between the property taken and the property which is the subject of the sale in evidence (so that the sale price of one will be of assistance in arriving at the value of the other) is necessarily left to the sound discretion of the trial judge. The discretion of the trial court is not however unlimited, and if evidence of sales which was admissible as a matter of law is excluded, or evidence of sales which was inadmissible as a matter of law is admitted, the verdict will be set aside upon exceptions properly taken.[11]

Sale of neighboring land, no matter how similar to the land taken, is not admissible unless the sale was within a reasonable time of the taking. What constitutes reasonable time is a question left to the discretion of the trial judge.[12] Remoteness in point of time will condemn the evidentiary value of a sale where there has been such a change in conditions during the interval as to make the sale an unreliable test of value.[13] Therefore courts are in agreement that in appropriate circumstances evidence of pre-condemnation sales is admissible. On the issue of whether testimony of a post-condemnation sale may be admitted into evidence, there is a conflict of authority.[14] The trial court, in the instant case, excluded testimony concerning the post-condemnation sale price of X real estate, not on the ground that the 112 day interval between the taking and the sale made it too remote as a matter of law, but because the sale of X real estate occurred subsequent to rather than before the taking, i.e. the trial court ruled as a matter of law that testimony concerning any post-condemnation sale may not be admitted into evidence.[15]

The Supreme Court of Rhode Island had not decided, prior to the instant case, whether testimony of a post-condemnation sale is admissible. The question to be resolved by the instant court was therefore whether there is any sound or logical reason which requires it to differentiate between pre-condemnation and post-condemnation sales. One authority stated that:

> Generally speaking, the courts make no distinction between sales occurring prior to the taking and sales consummated after the date when title has vested in the condemnor. They usually admit the latter type of evidence, sometimes qualifying their ruling by stating that the sale must not be too remote in time or that there must be no drastic change in market conditions.[16]

10. For a general discussion see 1 ORGEL, supra note 3, at § 138; 5 NICHOLS, supra note 4, at § 21.31.

11. *Id.*

12. *Id.* at § 139, 21.31(2).

13. *Id.*

14. *Id.*

15. 238 A.2d at 380.

16. 1 L. ORGEL, *supra* note 3, at § 139, p. 591.

Another authority, while conceding ample authority to the contrary, stated that "evidence of sales made subsequent to the taking are not admissible unless made almost simultaneously with the taking."[17]

The exclusionary rule is sometimes justified on the ground that a subsequent sale of property located in the vicinity of the property taken is really not comparable because such sales might have been affected by the taking itself, i.e. the sale will necessarily reflect an enhancement of or a diminuation in price which is attributable to the project or improvement (the construction of which the right to acquire by eminent domain was exercised) and thus would be inadmissible since fair market value must be established without any reference to condemnation.[18]

The decided cases which have allowed testimony as to post-condemnation sales, forward the proposition that although many times there is a possibility that the project which occasioned the taking resulted in the value of the neighboring land being inflated or deflated, that possibility does not warrant a presumption that there was an effect on price in any given case. Therefore as long as a likelihood exists that the price sought to be offered was not materially affected by the project occasioning the condemnation, the opportunity to present evidence to establish this fact should not be foreclosed by a hard and fast exclusionary rule prohibiting evidence of after condemnation sale prices.[19]

Following the rationale of the above cases, the instant court held that the trial judge rather than automatically barring evidence of a sale of otherwise comparable property merely because it occurred subsequent to condemnation, should first determine if the price paid was so materially distorted as to deprive the property sold of its comparability. The resolution of that issue and others, will determine the other property was suffi-

17. 5 NICHOLS, *supra* note 4, at § 21.31(2), p. 456.

18. *See, e.g.*, Shoemaker v. United States, 147 U.S. 282, 303 (1893); Jayson v. United States, 294 F.2d 808 (5th Cir. 1961); International Paper Co. v. United States, 22 F.2d 201, 209 (5th Cir. 1955); District of Columbia v. Lot 813 in Square 568, 232 F. Supp. 714, 719 (D.D.C. 1964), *aff'd* Rubenstein v. District of Columbia 346 F.2d 833 (1965); United States v. One Parcel of Land, 186 F. Supp. 433 (S.D.N.Y. 1960).

19. *See, e.g.*, United States v. 63.04 Acres of Land, 245 F.2d 140 (2d Cir. 1957); Knollman v. United States, 214 F.2d 106 (6th Cir. 1954); United States v. 5139.5 Acres of Land, 200 F.2d 659 (4th Cir. 1952); Davis v. Reid, 264 Ala. 560, 88 So. 2d 857 (1956); Montery County Flood Control & Water Conservation District v. Hughes, 20 Cal. Rptr. (1962); United States v. 3595 Acres of Land, 212 F. Supp. 617 (D.C. Cal. 1962); Kennedy v. State Highway Dept. 108 Ga. App. 1, 132 S.E.2d 135 (1963); Commonwealth, Dept. of Highways v. Parker, 388 S.W.2d 366 (1963); Iowa Development Co. v. Iowa Highway Commission, 108 N.W.2d (Iowa 1961); Zambarano v. Massachusetts Turnpike Authority, 350 Mass. 485, 215 N.E.2d 652 (1966); Hance v. State Roads Commission, 221 Md., 164, 156 A.2d 644 (1959); Mississippi State Highway Commission v. Stout, 134 So. 2d 467 (Miss. 1961); Re Lands of P. & M. Materials Corp., 38 Misc. 2d 734, 238 N.Y.S.2d 896 (1963); City of Houston v. Collins, 310 S.W.2d 697 (Tex. Civ. App. 1958); Morrison v. Cottonwood Development Co., 38 Wyo. 190, 266 P. 117 (1928).

ciently similar as to make its sale price relevant in valuing the condemned parcel.[20] The court noted that such an approach would avoid an exclusionary rule and also give the trial judge wide latitude with which to exercise his discretion in passing judgement on whether an after-sale price was in fact influenced by the condemnation.[21] The court conceded that this approach may prolong a trial by introducing the collateral issue of whether property has been enhanced or diminished in value and stated, "... that is not too large a price to pay in order to insure that no person's property should be taken for the public use without his being justly compensated and in order to protect the public against paying more than the fair market value."[22] The court emphasized that when the trial judge exercises this discretion in a non-jury trial, as in the instant case, it would be a better practice to admit the evidence and then weigh it, having regard for the danger of artificial inflation or deflation.[23]

It must be stressed that the instant case, along with the line of decisions which admitted testimony regarding post-condemnation sales,[24] does not stand for the proposition that any and every post-condemnation sale may be introduced into evidence if made within a reasonable time after the taking. The burden of proof must be sustained by the party offering evidence of a post-condemnation sale to establish that the property is comparable to the condemned parcel. If the particular facts of the case make it self-evident that the condemnation had so measurably increased or decreased the value of the property sold as to deprive it of the comparability it might have once had to the condemned property, a ruling excluding evidence of the sale should be sustained. However, if the facts neither make it self-evident or even remotely suggest that the sale price was materially affected by the project which give rise to the exercise of the eminent domain power, then the party must have an opportunity to establish a foundation of comparability upon which to predicate testimony of the after-sale price. After an opportunity has been afforded to such party, it is within the discretion of the trial judge to determine whether the party sustained his burden of proof and therefore whether the post-condemnation sale price shall be admitted as evidence of the fair market value of the condemned property.[25]

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20. 238 A.2d at 381.

21. *Id.*

22. *Id.*

23. *Id.*

24. *See* cases cited note 19 *supra.*

25. The court noted that although in the instant case the trial judge categorically rejected the appraisal by defendant's expert on the ground that the witness had given "great weight" to the sale price of X property and that normally to reject critical opinion on an unsound ground would constitute reversible error, since the defendant had not made an offer of proof that the sale price of X property had not been materially affected by the condemnation., the exclusion of such evidence did not constitute reversible error.

The instant court found a previous Rhode Island case, *Bruce v. State Department of Public Works*,[26] (which sustained a ruling excluding evidence of a post-condemnation sale price of abutting property) to be consistent with the view expressed in *Manning*. The instant court stated that the *Bruce* court sustained the ruling excluding evidence of the after-sale price, not because of a general rule of exclusion, but because the particular facts of the case made it self-evident that the after-sale price reflected an important enhancement of value because of the building of the project which prompted the taking.[27] The rule in Rhode Island is therefore that the trial judge rather than automatically barring evidence of a sale of comparable property merely because it occurred subsequent to condemnation should first decide if the price paid was so materially distorted as to deprive the property sold of its comparability.

The jurisdictions of Massachusetts, New York, and Texas, have indicated that evidence of sales of other real property which took place subsequent to the valuation date fixed in the case at bar was admissible on the issue concerning the value of the property in question because in these jurisdictions there are decisions which have both admitted and excluded evidence of post-condemnation sale prices depending on the circumstances of the case.[28] The above is also true in federal decisions in the second circuit.[29] The jurisdictions of Alabama, California, Georgia, Kentucky, Iowa, Maryland, Massachusetts, Wyoming, and the fourth, sixth, and ninth circuits in regarding this question have sustaianed rulings admitting testimony concerning after-condemnation sales.[30] In a number of jurisdictions the courts have indicated that evidence of sales of other real property

26. 93 R.I. 466, 176 A.2d 846 (1961).

27. 238 A.2d at 381-82.

28. Massachusetts—post-condemnation sale excluded—Cole v. Boston Edison Co., 338 Mass. 661, 157 N.E.2d 209 (1959). Post-condemnation sale admitted—Roberts v. Boston, 149 Mass. 346, 21 N.E. 668 (1889); Zambarano v. Massachusetts Turnpike Authority, 350 Mass. 485, 215 N.E.2d 652 (1966); Paradysz v. Commonwealth, 202 N.E.2d 795 (1964).

New York—post-condemnation sale excluded—Latham Holding Co. v. State, 261 N.Y.S.2d 880, 209 N.E.2d 542 (1962). Post-condemnation sale admitted—Matter of City of New York, 240 N.Y. 68, 147 N.E. 361 (1925); Four Park Avenue Corp. v. Lilly, 37 N.Y.S.2d 733 (1942); Dormann v. State, 167 N.Y.S.2d 760 (1957); Re Lands of P. & M. Materials Corp., 238 N.Y.S.2d 896 (1963).

Texas—post-condemnation sale excluded—Taub v. Houston Independent School District, 339 S.W.2d 227 (1960). Post-condemnation sale admitted—City of Houston v. Collins, 310 S.W.2d 697 (1958); Housing Authority of Dallas v. Hubbard, 274 S.W.2d 165 (1954); Hays v. State, 342 S.W.2d 167 (1960); Housing Authority v. Shambry, 252 S.W.2d 963 (1952); State v. Williams, 357 S.W.2d 799, (1962); State v. Dickerson, 370 S.W.2d 742 (1963).

29. Post-condemnation sale excluded—United States v. Meadow Brook Club, 259 F.2d 41 (1958); United States v. 1108 Acres of Land, 204 F. Supp. 737 (1962); United States v. 7.14 Acres of Land, 198 F. Supp. 120 (1961). Post-condemnation sale admitted—United States v. 63.04 Acres of Land, 245 F.2d 140 (1957).

30. *See* cases cited note 19 *supra*.

which took place subsequent to the valuation date fixed in the case at bar was not admissible on the issue of the value of the land in controversy. None of the cases discussed a hard and fast rule of exclusion, which precludes consideration of subsequent sales. However, the language of the courts in Illinois, Arizona, the district court for the District of Columbia, and the Circuit Court of Appeals for the Fifth Circuit, indicate that these courts are more readily susceptible to exclude testimony concerning post-condemnation sales than the remaining jurisdictions (Louisiana, New Jersey, Nebraska, Missouri, Montana, South Dakota, Virginia and the Court of Appeals for the First Circuit) which have excluded evidence of post-condemnation sales. The courts in Arizona, Illinois, District of Columbia, and the Fifth Circuit although conceding *arguendo* the after sales might be admissible in some situations, indicate that the mere taking of property for the public use places such real estate in a different category than the surrounding lands which will not be taken, and therefore which will receive special benefits or burdens from the condemnation. Consequently, the trial judge does not err in refusing to admit testimony which occurred after the taking.[31] Although conceding that there is no absolute rule which precludes consideration of subsequent sales, it appears that in Arizona, Illinois, District of Columbia, and the Fifth Circuit, evidence of post-condemnation sales will not be admissible unless made almost simultaneously with the taking. The courts in Louisiana, New Jersey, Nebraska, Missouri, Montana, South Dakota, Virginia, and the First Circuit excluded evidence of post-condemnation sale prices on the ground that it was self-evident from the particular facts of the case that the after-sale price reflected an important enhancement or depreciation of value because of the building of the project which prompted the taking.[32] Such basis was the reason given by the Rhode Island court in excluding after-sale prices in the *Bruce* case. The opinions in these decisions, unlike the opinions in the Arizona, Illinois, District of Columbia, and the Fifth Circuit, were not motivated by the premise that as a general rule sales made after the date of the taking are inadmissible *per se*, or by the implication that every public project increases or decreases the value of the surrounding land. For example, in *May v. Dewey*[33] the Virginia Court excluded evidence of

31. Thomas v. Brown, 75 Ariz. 385, 257 P.2d 398, 400-1 (1953); City of Chicago v. Blanton, 15 Ill.2d 198, 154 N.E.2d 242, 244-45 (1958); Jayson v. United States, 294 F.2d 808, 810 (5th Cir. 1961); District of Columbia v. Lot 813 in Square 568, 232 F. Supp. 714, 719 (D.D.C. 1964).

32. United States v. Iriarte, 166 F.2d 800, *cert. den.* 335 U.S. 816 (1st Cir. 1948); State Department of Highways v. Dodge, 168 So. 2d 430 (La. 1964); State Highway Comr. v. National Fireproofing Corp., 127 N.J.L. 346, 22 A.2d 268 (1941); State Department of Roads v. Mahloch, 174 Neb. 190, 116 N.W.2d 305 (1962); State ex rel. State Highway Com. v. Bowling, 414 S.W.2d 551 (Mo. 1967); State Highway Com. v. Churchwell, 403 P.2d 751 (Mont. 1965); State Highway Com. v. Lacey, 113 N.W.2d 50 (S.D. 1967); May v. Dewey, 201 Va. 621, 112 S.E.2d 838 (1960).

33. 201 Va. 621, 112 S.E.2d 838 (1960).

commerical property in the area of the land condemned which occurred two years after the completion of the project which occasioned the taking. Also, in *State ex rel. State Highway Com. v. Bowling*,[34] evidence of the terms of an executory contract of sale was excluded by the Missouri Court in a condemnation case where the date of the contract was for more than eight years after the taking. Whether the courts in these jurisdictions would hold all sales made after the date of the taking to be inadmissible on the ground that the sale reflected an increase or decrease in value due to the condemnation, or whether these courts will follow the rationale of the instant Rhode Island case, is open to question.

The court in the instant case did not set forth guidelines which may be used for a determination as to whether the sale of alleged comparable lands reflect an increase or decrease in value as a result of the condemnation. Perhaps no adequate guidelines can be set up since a determination of whether a piece of land is comparable to the condemned land necessarily depends on the location and character of the property, and the circumstances in each particular case. However, an analysis of the decided cases reveals the following factors.

(a). The property must be sold within a reasonable time of the condemnation—the more remote in point of time the less likely the sale price of such post condemnation sale lands will be of probative value in fixing the value of the condemned land—especially if the lands in question are situated in a highly developed area as contrasted with those lands which are located in a rural area.[35]

(b). The nature of the project (such as major highway projects) for which the condemned land is taken is not of itself determinative of whether the after sold land reflected an enhancement or diminuation in value because of the condemnation.[36] However, major projects which occasioned the condemnation, especially if the project is being built in a highly developed area or is a project which will greatly benefit the community as a whole, will be more likely to be found to have affected

34. 414 S.W.2d 551 (1967).

35. For examples see City of Chicago v. Blanton, 15 Ill.2d 198, 154 N.E.2d 242 (1958) (evidence of sale occurring some six months after the filing of the condemnation was excluded because the filing of the condemnation action was to acquire property for a school, and the area around the condemned property had a serious school problem with the closest public educational facility being a half mile away); Paradysz v. Commonwealth, 202 N.E.2d 795 (Mass. 1964) (evidence of sales of open farmland located adjoining to and within ¾ of a mile from locus was admissible where sales were made up to five years after the taking).

36. *See, e.g.*, cases admitting evidence of post-condemnation sales where the taking was for a highway project—Zambarano v. Massachusetts Turnpike Authority, 350 Mass. 485, 215 N.E.2d 652 (1966); Hance v. State Roads Commission, 221 Md. 164, 156 A.2d 644 (1959). Cases excluding evidence of post-condemnation sales where the taking was for a highway project—District of Columbia v. Lot 813 in Square 568, 346 F.2d 833 (1965); May v. Dewey, 201 Va. 621, 112 S.E.2d 838 (1960).

the value of surrounding lands than those projects which are of a smaller nature.[37]

(c). The property must be comparable to the condemned parcel in all other respects.[38]

The situation in Pennsylvania in regard to the admissibility of post-condemnation sales is not clear. The Pennsylvania Supreme Court held in the case of *Simpson v. Pa. Turnpike Com.*[39] that testimony regarding the sale price of a piece of land sold several years subsequent to the condemnation was "manifestly incompetent."[40] The Pennsylvania Supreme Court did not discuss why such testimony was incompetent, either because of an absolute rule in Pennsylvania which prohibits the introduction of post-condemnation sales or because the facts in the *Simpson* case made it self-evident that the condemnation greatly affected the value of the land sought to be introduced as evidence of the fair market value of the condemned parcel. Eight years subsequent to the *Simpson* decision, Pennsylvania in 1964 adopted an Eminent Domain Code.[41] Section 705(2)(i) of the Code provides:

> A qualified valuation expert may testify on direct or cross-examination in detail as to the valuation of the property on a comparable market value which testimony may include, but shall not be limited to, the price and other terms of any sale or contract to sell . . . comparable property made within a reasonable time *before or after* the date of condemnation. (Emphasis added).[42]

This section of the new Eminent Domain Code has not been judicially interpreted. Under this section however, it is clear that the sale price, if "made within a reasonable time" would be admissible even though the evidence sought to be placed in the record is the sale price of a comparable piece of property sold after the date of condemnation. However, if the sale price of the otherwise comparable property were affected by the

37. Evidence of post-condemnation sales were excluded where condemnation was for the purpose of acquiring property for a school where existing educational facilities were some distance away—City of Chicago v. Blanton, 15 Ill. 2d 198, 154 N.E.2d 242 (1958); Taub v. Houston. Independent School District, 339 S.W.2d 227 (Tex. Civ. App. 1960). Evidence of a post-condemnation sale was admitted however, where condemnation was for the purpose of building a courthouse—Roberts v. Boston, 149 Mass. 346, 21 N.E. 668 (1889).

38. In International Paper Co. v. United States, 227 F.2d 201 (5th Cir. 1955), the court excluded testimony concerning post-condemnation sale prices on the ground that the tracts were too small in comparison to the tract condemned.

39. 384 Pa. 335, 121 A.2d 84 (1956).

40. *Id.* at 338.

41. PA. STAT. ANN., tit. 26 § 1-101 to -903 (1964).

42. PA. STAT. ANN., tit. 26 § 705(2)(i) (1964).

condemnation, it would not and should not be admitted.[43] The question remains as to what constitutes a reasonable time and when is the after-sale price affected by the condemnation. It is evident that the Pennsylvania courts could easily circumvent section 705(2)(i), if the court believed that any evidence of post-condemnation sale prices should be excluded in determining the fair market value of the condemned property, by excluding evidence of after sale prices on the ground that the after sale was not made within a reasonable time of the condemnation or the condemnation had materially affected the sale price of the subsequently sold property.

When the issue comes before the Supreme Court in Pennsylvania, or any state or federal court of whether testimony concerning an after sale price should be admitted into evidence, the better approach would be that followed in the instant decision. Evidence of post-condmenation sale prices should be admitted if the price paid was not materially distorted by the comndemnation as to deprive the property sold of its comparability.

Donald J. Burns

TORTS—STRICT LIABILITY FOR DEFECTIVE PRODUCTS—The Pennsylvania Supreme Court has adopted the Restatement 2d, Torts, Section 400, which provides that "one who puts out as his own product a chattel manufactured by another is subject to the same liability as though he were its manufacturer." Strict liability now applies, not only to the manufacturer of defective products unreasonably dangerous, but also to distributors of such products.

Forry v. Gulf Oil Corporation, 428 Pa. 334, 237 A.2d 593 (1968).

In *Forry* a defective[1] tire was manufactured by B.F. Goodrich, distributed

43. Section 604 of the new Eminent Domain Code, PA. STAT. ANN., tit. 26 § 604 (1964), provides that any decline or increase in the fair market value caused by the general knowledge of the imminence of the condemnation is to be disregarded in determining the fair market value of the condemned parcel. The principle enunciated in section 604 (if the fair market value of the property to be condemned is, prior to the date of condemnation, affected by the imminence of the condemnation such change in the fair market value is to be disregarded) would probably be applicable to section 705(2)(i), especially in view of such previously discussed cases as United States v. 63.04 Acres of Land, 245 F.2d 140 (2d Cir. 1957); International Paper Company v. United States, 227 F.2d 201 (5th Cir. 1955) which held that evidence of after sale prices are inadmissible if affected by the condemnation.

1. The court assumed a defect at 428 Pa. 334, 343, 237 A.2d 593, 598. Tire defects are a major cause of accidents and most tire defects concern the tire bead—that portion of the rubber and steel wire holding the tire to the rim. Philo, *Automobile Products Liability Litigation*, 4 DUQUESNE L. REV. 181, 199 (1965).